IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1471

CIVIC TELECASTING CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF IN OPPOSITION FOR RESPONDENTS CAPITAL CITIES COMMUNICATIONS, INC., AMON G. CARTER, JR., AND NORTH TEXAS BROADCASTING CORPORATION

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OPINIONS BELOW

The court of appeals' opinion is officially reported at 523 F.2d 1185 (1975) and appears in the Appendix to the Petition. (App. 1a-7a.)[1] The orders of the Federal Communications Commission are officially reported at 46 F.C.C.2d 1075, *reconsideration denied*, 48 F.C.C.2d 669 (1974), and 46 F.C.C.2d 1099, *reconsideration denied*,

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[1] "App. ——" citations are to the Appendix to the Petition for Writ of Certiorari.

48 F.C.C.2d 693 (1974). They also appear in the Appendix to the Petition. (App. 10a-52a.)

JURISDICTION

The court of appeals' judgment was entered on November 28, 1975. A petition for rehearing en banc was denied on January 8, 1976. A properly printed petition for a writ of certiorari reflecting the name of a member of the Bar of this Court as counsel was first filed on April 13, 1976, 96 days thereafter.[2] Jurisdiction of this Court properly may be invoked under 28 U.S.C. § 1254 (1) (1970).

QUESTION PRESENTED

Whether the court of appeals erred in affirming orders of the Federal Communications Commission (the "Commission") granting applications for renewal and assignment of broadcast station licenses on the basis of a determination that there were no substantial and material questions of fact requiring a hearing.

STATUTE INVOLVED

The relevant statutory provision, section 309(d) of the Communications Act of 1934 (the "Communications Act"), 47 U.S.C. § 309(d) (1970) provides:

> "(1) Any party in interest may file with the Commission a petition to deny any application (whether

[2] The petition was first filed on February 25, 1976. The Clerk returned it for failure to comply with the printing requirements of U.S. Supreme Court Rule 39 and for failure to show on the cover the name of a member of the Bar of the Supreme Court as required by the same rule. On March 25, 1976, petitioner's motion for leave to proceed *in forma pauperis* and *pro se* was denied. As of that date, there remained 13 days in which to file a timely petition or to move for an extension of time. Because of petitioner's failure to do either, the petition should be dismissed as untimely. *See* 28 U.S.C. § 2101 (1970).

> as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a) of this section. Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.
>
> "(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial or material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a) of this section, it shall proceed as provided in subsection (e) of this section."

STATEMENT OF THE CASE

This case arises from petitions filed with the Commission by Civic Telecasting Corporation ("Civic") seeking denial of eleven broadcast applications filed by five different parties on the basis of facts allegedly in Civic's possession but which Civic consistently failed to disclose to the Commission.

Civic's first petition to deny, dated June 30, 1971, sought denial of the applications for broadcast license renewal filed by three Dallas-Fort Worth licensees [3] on the ground that the licensees had conspired to obstruct the development of community antenna television and UHF television in the Dallas-Fort Worth market. Petitioner attempted to support these allegations with information discovered in an antitrust suit which had been brought against two of the licensees [4] on September 9, 1970, by another corporation owned by petitioner's principals. On September 10, 1971, the broadcast licensees filed oppositions to the Civic petition. The oppositions each included affidavits denying petitioner's allega-

[3] The licensees were Carter Publications, Inc. ("Carter"), licensee of WBAP (AM, FM and TV), Fort Worth, and publisher of the *Fort Worth Star Telegram*; A. H. Belo Corporation, licensee of WFAA (AM, FM and TV), Dallas, and KFDM-TV, Beaumont, and publisher of the *Dallas Morning News*; and Times Herald Printing Company, licensee of KDFW-TV, Dallas, and publisher of the *Dallas Times Herald*.

[4] Respondent Carter was named as co-conspirator in that suit, but not a party defendant.

The Commission considers violations of the antitrust laws as bearing on an applicant's character qualifications to be a Commission licensee. *Establishment of a Uniform Policy To Be Followed in Licensing of Radio Broadcast Stations Cases in Connection With Violations by an Applicant of Laws of the U.S. Other Than The Communications Act of 1934, As Amended,* Docket No. 9572, 42 F.C.C.2d 399, 401 (1951). Such violations are not automatically disqualifying, but the circumstances are taken into account along with all other relevant factors when the licensing decision is made. *Id.*

tions and explaining in detail the conduct from which petitioner sought to draw inferences of improper activity. (*See, e.g.*, App. 21a, 25a.) Petitioner thereafter contended that, because of protective orders entered by the district court in the antitrust proceeding on September 30, 1971, it was unable to complete its reply pleading and provide further "damaging information" in support of its allegations of anticompetitive conduct. (App. 4a.)

While Civic's petition to deny the above-described renewal applications was pending, respondent Carter entered into agreements to assign its Fort Worth newspaper and broadcast stations to respondents Capital Cities Communications, Inc. and North Texas Broadcasting Corporation, and in early 1973, pursuant to section 310 of the Communications Act, the parties filed applications with the Commission seeking the agency's approval of the broadcast assignments. *See* 47 U.S.C. § 310 (d) (Supp. IV, 1974). Civic then filed its second petition to deny, this time seeking denial of the assignment applications, on the ground *inter alia* that Carter was not qualified to assign the licenses because of its participation in the alleged anticompetitive activities.

In an order released on May 23, 1973, the Commission made clear that it would not act on the petitions to deny—or the applications for renewal and assignment pending before it—until petitioner was no longer inhibited by the antitrust protective orders in its efforts to utilize the discovered materials to perfect its pleadings. (App. 9a.) As the Commission subsequently found (App. 16a-17a), the protective orders were later modified or waived so that the petitioner was no longer prohibited from providing to the Commission any relevant information that petitioner claimed to have discovered in the antitrust proceeding. (App. 2a n.1, 18a.) On February 13, 1974, the Commission staff accordingly

ordered petitioner to proceed by perfecting its responsive pleadings.[5]

Nevertheless, petitioner asserted that ambiguities remained in the district court's orders lifting the protective decrees, and it continued to insist that it could not provide further information to the Commission. The Commission made additional efforts to obtain further information from petitioner, and it requested that, if petitioner could not provide the specific evidence on which it desired to rely, it at least identify the relevant documents and material which it was prevented from disclosing. Petitioner failed to provide any further information, and, on May 13, 1974, the Commission concluded that "[p]etitioner's unwillingness to perfect its responsive pleading . . . is unreasonable, and the Commission will not allow this proceeding to be further prolonged." (App. 18a.)[6]

The Commission thereupon reviewed petitioner's charges, the information which petitioner had provided and the licensees' sworn responses thereto, and it determined that there were no substantial or material questions of facts bearing adversely on the licensees' conduct. On the basis of that finding, and pursuant to Section 309(d) of the Communications Act, the Commission denied the petitions to deny and granted the applications here involved.[7] Petitioner thereafter sought reconsidera-

[5] On February 1, 1974, the antitrust suit had been dismissed pursuant to a negotiated settlement. The Court order dismissing the suit stated that there was insufficient evidence to establish that the licensees had engaged in unlawful practices. (App. 15a.)

[6] Petitioner made no efforts to obtain clarification of the protective orders until after the Commission had acted. (App. 47a n.5.)

[7] App. 19a-30a, 35a, 43a. This case involves only those orders of the Commission granting renewal of Carter's radio and television licenses and authorizing their assignment to respondents Capital Cities and North Texas respectively.

tion of the Commission's action, but even in its petitions for reconsideration it neither provided information in support of its allegations nor identified the discovered, but allegedly protected, documents on which it desired to rely. Reconsideration was also denied, and petitioner appealed.

After careful review of the Commission's opinion, the court of appeals concluded, unanimously and *per curiam*, that the Commission had "correctly determined that Civic had unreasonably refused to come forward with the promised damaging information" and that "on the facts and allegations before it," and in light of the Commission's "detailed analyses" of petitioner's claims, the Commission reasonably granted the applications without a hearing. (App. 3a, 6a-7a.) The court found that petitioner was in fact contending that the Commission had a "broad duty" to

> "launch its own full-scale investigation, or schedule a hearing whenever a petition to deny *failed* to present facts sufficient to indicate a substantial question that the renewal would not serve the public interest, convenience and necessity." (App. 1a-2a, emphasis supplied.)

In light of petitioner's refusal either to present evidence or to itemize the documents that it was prevented from utilizing, the court concluded that petitioner's suggestion in the context of this case "would not only place an impossible burden on the . . . [Commission] but it would also contravene the license renewal procedures outlined in the Communications Act . . . ." (App. 5a.) The court affirmed the Commission.

ARGUMENT

This case meets none of the traditional criteria for grant of a writ of certiorari.[8] It constitutes, rather, an

[8] *See* U.S. Sup. Ct. R. 19.

attempt to obtain Supreme Court review of a carefully reasoned court of appeals determination, made in accordance with well-established standards of review, that an administrative agency acted properly in rejecting unsubstantiated allegations regarding licensee conduct.

Petitioner attempts to bring this case within the criteria set forth in Rule 19 by asserting that it presents "important questions of federal law which have not been, but should be, settled by this Court." But the questions decided by the court below—rather than raising novel questions of law—were simply:

> "(1) whether the FCC correctly determined that Civic had unreasonably refused to come forward with the promised damaging information to support its allegations; and (2) whether, on the facts and allegations before it, the FCC could reasonably have granted the renewal without a hearing." (App. 3a.)

Petitioner does not directly challenge the court's resolution of these two questions. Rather, it argues that—notwithstanding petitioner's failure to raise any substantial question of fact with regard to the licensees' qualifications—the Commission should have initiated its own full-scale investigation of petitioner's charges and required the licensees involved to turn over all of the material discovered by petitioner's principals in the antitrust proceeding. The court below could not, "under the facts of this case, perceive any reason for so burdening the agency" (App. 2a), and that conclusion is clearly supported by applicable statutory standards.

Section 309(d)(1) of the Communications Act requires that a petition to deny an application for renewal or assignment of a broadcast license contain "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent" with the public interest, convenience and necessity. That

section also gives licensees the right to respond to petitions to deny. *Id.* Section 309(d)(2) provides:

> "If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a) of this section, it shall make the grant . . . ."

Only if the Commission cannot make those findings must a hearing be held.[9] The Commission found, and the court below (applying traditional legal standards) affirmed, that Civic's petition had failed to meet the threshhold burden of raising such a fact question.

To be sure, as petitioner notes, the Commission also has the duty to go beyond bare petitions before it and inquire into any matters relevant to a licensee's qualifications "where the Commission has reason to believe, either from the protest or its own files, *that a full . . . hearing may develop other relevant information not in*

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[9] *Id.; accord, Columbus Broadcasting Coalition* v. *FCC*, 164 U.S. App. D.C. 213, 505 F.2d 320 (1974); *Stone* v. *FCC*, 151 U.S. App. D.C. 145, 466 F.2d 316 (1972); *Marsh* v. *FCC*, 140 U.S. App. D.C. 384, 436 F.2d 132 (1970). Section 309(d) was amended in 1960. The Congressional purpose in adopting the present language was to require that a petition to deny make

> "a substantially stronger showing of greater probative value than is now necessary in the case of a post-grant [of initial license] protest." S. Rep. No. 690, 86th Cong., 1st Sess. 3 (1959).

Formerly, the showing required was

> "merely an articulated statement of some fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity, or that the licensee was technically or financially unqualified, contrary to the Commission's initial finding." *Federal Broadcasting System, Inc.* v. *FCC*, 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563 (1955) (footnote omitted).

the possession of the protestant." *Clarksburg Publishing Co.* v. *FCC*, 96 U.S. App. D.C. 211, 215, 225 F.2d 511, 515 (1955) (emphasis added). Here, the Commission carefully reviewed the evidence before it; concluded that petitioner's failure to produce information which was in its possession was unreasonable; and found that the licensees had "adequately dispelled" any relevant inferences that could be drawn from the facts alleged by petitioner. (App. 30a.) Under these circumstances, it is clear that the *Clarksburg* standard was met. The Commission had no reason to believe that a hearing would produce information relevant to the charges. The court below carefully reviewed that determination and there is no reason for further review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be dismissed as untimely or denied.

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May 14, 1976